A

AFFIN BANK BHD

v.

HIB-C INDUSTRIES SDN BHD & ORS

B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
CLEMENT SKINNER JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: B-02-1717-2010]

C

15 JANUARY 2013

BANKING: *Banks and banking business - Guarantees - Default in repayment of loan - Recovery of sum loaned - Notice of demand issued to guarantors - Whether notice of demand received by guarantors - Letter*

D

of guarantee - Construction of clause in letter of guarantee

CIVIL PROCEDURE: *Service - Notice of demand - Default in repayment of loan - Recovery of sum loaned - Notice of demand issued to guarantors - AR cards signed by unknown person - Whether notice of demand received by guarantors - Letter of guarantee - Construction of*

E

clause in letter of guarantee - Whether service proper

The appellant had granted banking facilities to the first respondent ('the borrower') in the sum of RM980,000 and the facilities were guaranteed by the second, third and fourth respondents ('the

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guarantors'). However, the borrower defaulted in repayment, resulting in the appellant suing the borrower and the guarantors. Judgment in default was entered against the borrower and the fourth respondent. The appellants' appeal herein was confined to the second and third respondents only. It was the second and

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third respondents' defence that they did not receive any notice of demand under the guarantee, in accordance with cl. 5 of the letter of guarantee and put the appellant to strict proof thereof. The trial judge held that the notice of demand was not served on the second and third respondents on the ground that the

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appellant's Vice President of Special Asset Management ('PW4') in charge of recovery of loans conceded that the recipient of the notice of the demand was Customax Sdn Bhd ('Customax'), as evidenced by Customax's rubber stamp on the AR cards. It was further held that based on the AR cards, the respondents did not

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receive the notice of demand. Hence, the present appeal which centred on the main issue of the proper construction of cl. 12 of the letter of guarantee executed by the second and third respondents in favour of the appellant.

Held (allowing appeal with costs)
Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) Clause 12 of the letter of guarantee was crystal clear and devoid of any ambiguity. The onus on the appellant was merely to show that the notice of demand to the second and third respondents was sent by post addressed to them at their addresses as stated in the letter of guarantee or at their last known place of business or abode. In proving such service, it would be sufficient to prove that the notice of demand was properly addressed and put in the post notwithstanding that the said notice of demand might subsequently be returned undelivered by postal authorities. (para 10)

(2) It was immaterial whether the notice of demand was actually delivered or not. The fact that the AR cards were signed by an unknown person and bore the rubber stamp of Customax was irrelevant to the appellant's claim based on the letter of guarantee. The admission by PW4 that the AR cards showed that the notice of demand was received by Customax and not by the second and third respondents had no bearing on the proper construction of cl. 12 of the letter of guarantee and could not form the basis of dismissing the appellant's claim against the second and third respondents. (para 11)

(3) The cross appeal by the second and third respondents were without any merit and were dismissed with costs. The appellant's appeal was allowed with costs here and below and judgment was ordered to be entered against the second and third respondents as pleaded. (paras 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memberikan kemudahan perbankan kepada responden pertama ('peminjam') berjumlah RM980,000 dan kemudahan tersebut dijamin oleh responden kedua, ketiga dan keempat ('penjamin-penjamin'). Walau bagaimanapun, peminjam ingkar dalam pembayaran balik, menyebabkan perayu memulakan tindakan terhadap peminjam dan penjamin-penjamin. Penghakiman ingkar telah dimasukkan terhadap peminjam dan responden keempat. Rayuan perayu di sini adalah terhadap defendan-defendan kedua dan ketiga sahaja. Adalah menjadi pembelaan responden-responden kedua dan ketiga bahawa mereka tidak menerima sebarang notis tuntutan di bawah jaminan, menurut kl. 5 surat jaminan dan

meletakkan beban pembuktian ketat ke atas perayu. Hakim bicara memutuskan bahawa notis tuntutan tersebut tidak diserahkan kepada responden-responden kedua dan ketiga atas alasan bahawa Naib Presiden Pengurusan Aset Khas perayu, ('PW4') yang bertanggungjawab bagi mendapatkan balik pinjaman, memberi keterangan bahawa penerima notis tuntutan adalah Customax Sdn Bhd ('Customax'), seperti yang dibuktikan oleh cop Customax yang terdapat pada kad AR. Diputuskan juga bahawa berdasarkan kad AR, responden-responden tidak menerima notis tuntutan. Oleh itu, rayuan ini yang tertumpu pada isu utama berkenaan pentafsiran betul kl. 12 surat jaminan yang dimeterai oleh responden-responden kedua dan ketiga bagi memihak perayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Klausa 12 surat jaminan adalah jelas dan tidak mempunyai sebarang keraguan. Beban atas perayu adalah semata-mata untuk membuktikan bahawa notis tuntutan kepada responden-responden kedua dan ketiga telah dihantar melalui pos yang dialamatkan ke alamat mereka seperti yang terdapat dalam surat jaminan atau di tempat terakhir perniagaan atau tempat tinggal mereka yang diketahui. Dalam membuktikan penyampaian sedemikian, adalah cukup untuk membuktikan bahawa notis atau tuntutan telah dialamatkan dengan betul dan dimasukkan ke dalam pos walaupun notis tuntutan tersebut mungkin kemudiannya akan dikembalikan tanpa dihantar oleh pihak berkuasa pos.

(2) Ia tidak material sama ada notis atau tuntutan tersebut sebenarnya dihantar atau tidak. Hakikat bahawa kad AR telah ditandatangani oleh orang yang tidak dikenali dan mempunyai cop Customax adalah tidak relevan kepada tuntutan perayu berdasarkan surat jaminan. Pengakuan PW4 bahawa kad AR menunjukkan bahawa notis permintaan telah diterima oleh Customax dan bukan oleh responden-responden kedua dan ketiga tidak mempunyai kaitan dengan tafsiran sebenar kl. 12 surat jaminan dan tidak dapat membentuk asas untuk menolak tuntutan perayu terhadap responden-responden kedua dan ketiga.

(3) Rayuan balas oleh responden-responden kedua dan ketiga adalah tanpa sebarang merit dan ditolak dengan kos. Rayuan perayu telah dibenarkan dengan kos di sini dan di mahkamah bawahan dan penghakiman diperintah untuk dimasukkan terhadap responden-responden kedua dan ketiga seperti yang diplidkan.

Case(s) referred to:

Amanah Merchant Bank Bhd (formerly known as Amanah Chase Merchant Bank Bhd) v. Lim Tow Choon (Through Official Assignee) [1994] 2 CLJ 1 SC ***(refd)***

Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC ***(refd)***

For the appellant - P Mithran; M/s Dass, Jainab & Assocs
For the 2nd respondent - Mandave Singh Gill; M/s KS Dass & Gana
For the 3rd respondent - Amarjeet Singh; M/s Zubeda & Amarjeet

[Appeal from High Court, Shah Alam; Civil Suit No: 22-488-1997]

Reported by Najib Tamby

JUDGMENT

Abu Samah Nordin JCA:

[1] The only issue in this appeal is on the proper construction of cl. 12 of the letter of guarantee dated 6 April 1996 (exh. P3) executed by the second and third respondents in favour of the appellant.

[2] By a facility agreement dated 7 June 1996 Affin Bank Bhd (previously known as BSN Commercial Bank (Malaysia) Bhd) granted banking facilities to HIB-C Industries Sdn Bhd ('the borrower') totalling RM980,000 consisting of an overdraft facility of RM500,000 and a term loan of RM480,000.

[3] The second, third and fourth respondents, being directors of the borrower company (first defendant in the High Court) stood as guarantors to the said banking facilities and agreed to pay all moneys owing or remaining unpaid from the borrower, jointly and severally, upon demand. Clause 5 of the letter of guarantee states that this guarantee is a continuing guarantee and is limited to RM980,000 only.

[4] Upon the borrower's default in repayment of the principal sum and the interests due thereon, the appellant sued the borrower and all the three guarantors. Judgment in default was entered against the borrower and the fourth respondent on 29 May 1999. The appellant's appeal before us is confined to the second and third respondents only although the notice of appeal named all the defendants in the court below, as respondents.

[5] The second and third respondents, in their separate statement of defence, *inter alia*, pleaded that they did not receive any notice of demand under the guarantee and put the appellant to strict proof thereof.

[6] At the trial, the appellant called four witnesses. The second and third respondents did not testify. Learned counsel for the respondents elected to make a submission of no case to answer.

[7] The learned trial judge dismissed the appellant's claim with costs on the ground that the notice of demand was not served on the second and third respondents in accordance with cl. 12 of the letter of guarantee.

[8] Clause 12 of the letter of guarantee provides:

> 12. Any demand for payment or any other demand or notice under this guarantee may be made by any of your manager, sub-manager, secretary or other officers for the time being appointed by you or by any person or firm for the time being acting as your solicitor or solicitors by letter sent by post addressed to me/us or each of us at my/our address specified herein or at my/our last known place of business or abode and a demand or notice so sent shall be deemed to be served on the day following that on which it is posted. In proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by the postal authorities.

[9] The learned trial judge held the view that the notice of demand was not served on the second and third respondents on the ground that the appellant's Vice President of Special Asset Management (PW4) in charge of recovery of loans conceded in cross examination that the recipient of the notice of demand was Customax Sdn Bhd and that based on the AR Cards the

respondents did not receive the notice of demand. The learned trial judge found that the signature which appeared on the AR Cards bore the rubber stamp of Customax Sdn Bhd. The learned judge relied on *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219; [1987] 2 MLJ 610 cited by the respondents rather than *Amanah Merchant Bank Bhd (formerly known as Amanah Chase Merchant Bank Bhd) v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1, cited by the appellant. This is what the learned judge said:

> In *Mok Hin Wah*'s case, the guarantors received carbon copies of the demand and yet the Supreme Court held that demand were not sufficient. In the instant case, it was very clear that someone else receive the letters of demand. It is my view there was no real and proper demand made by the plaintiff against the second and third defendants.

[10] In our judgment, cl. 12 of the letter of guarantee is crystal clear and devoid of any ambiguity. The onus on the appellant is merely to show that the notice of demand to the second and third respondents was sent by post addressed to them at their addresses as stated in the letter of guarantee or at their last known place of business or abode. The demand or notice so sent shall be deemed to be served on the day following that on which it is posted. In proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post **notwithstanding that the said notice or demand may subsequently be returned undelivered by postal authorities.** (emphasis added).

[11] It is an undisputed fact that the notice of demand (exhibit P13) was sent to the second and third respondents according to their addresses as specified in the letter of guarantee. The AR Cards were exhibited as P13A. The reference number of the notice of demand is written on the AR Cards. It is immaterial whether such notice or demand was actually delivered or not. The fact that the AR Cards were signed by an unknown person and bore the rubber stamp of Customax Sdn Bhd is irrelevant to the appellant's claim based on the letter of guarantee in view of cl. 12 of the letter of guarantee. The admission by PW4 that the AR Cards showed that the notice of demand was received by Customax Sdn Bhd and not by the second and third respondents has no bearing on the proper construction of cl. 12 of the letter of guarantee and cannot form the basis of dismissing the appellant's claim against the second and third respondents.

[12] The true meaning of a common deeming clause in a letter of guarantee had been authoritatively explained in *Amanah Merchant Bank Bhd* case, *supra*. In that case the appellant's solicitor sent the notice of demand pursuant to cl. 17 of the letter of guarantee to the respondent at his last known address. Clause 17 of the letter of guarantee states:

> 17. Any notice may be served on the undersigned or his/their executors administrators or legal representatives either personally or by sending the same through the post in an envelope addressed to the last known place of address of the person to be served and a notice so sent shall be deemed to be served on the day following that on which it is posted.

[13] The AR Card had not been returned. The respondent denied receiving it. The trial judge dismissed the claim on the ground that the burden was on the appellant to prove that the said notice had been sent to and received by the respondent. On appeal by the appellant, the Supreme Court (as it then was) reversed the said decision and allowed the appellant's claim against the respondent. Mohamed Dzaiddin Abdullah SCJ, in delivering the judgment of the Supreme Court said:

> For reasons stated above, in our judgment, on the true construction of cl. 17 of the guarantee, the notice of demand sent by AR registered post and acknowledged receipt for service by the postal authority on 9 March 1988 was effectively served on the respondent on the following day, despite the non-return of the retour card by virtue of the deeming provision therein. In the result, the appellant had established a cause of action against the respondent. Accordingly, we allow this appeal, and with the consent of the parties, we make no order as to costs. The deposit will, however, be refunded to the appellant.

[14] The case against the second and third respondents herein is even stronger. Clause 12 of the letter of guarantee expressly states that in proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put in the post notwithstanding that the said notice or demand may subsequently be returned undelivered by the postal authorities. There is no such corresponding provision in cl. 17 of the guarantee in *Amanah Merchant Bank Bhd, supra.*

Cross Appeal

[15] The purpose of the cross appeals by the second and third respondents is merely to support the decision of the trial judge, by advancing additional grounds as to why the said decision must be affirmed. In our judgment the cross appeals are without any merit.

[16] For the aforesaid reasons we allowed the appellant's appeal with costs here and below and ordered that judgment be entered against the second and third respondents as pleaded and that the cross-appeals be dismissed with costs.